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3
4 UNITED STATES DISTRICT COURT

5 EASTERN DISTRICT OF WASHINGTON

6
7 DENNIS PATRICK OYARZO,

8 Plaintiff,

9 vs.

10 CAROLYN W. COLVIN, Acting
11 Commissioner of Social Security,

12 Defendant.

No. CV- 14-3149-JPH

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

13 BEFORE THE COURT are cross-motions for summary judgment. ECF No.

14 13, 14. The parties have consented to proceed before a magistrate judge. ECF No.

15 7. After reviewing the administrative record and the parties' briefs, the court

16 grants defendant's motion for summary judgment, **ECF No. 14**.

17 **JURISDICTION**

18 Oyarzo applied for supplemental security income (SSI) benefits on January
19 10, 2010, alleging onset (as amended) beginning May 11, 2010 (Tr. 29, 156-61).

1 Benefits were denied initially and on reconsideration (Tr. 84-92, 96-102). ALJ
2 Kimberly Boyce held a hearing July 19, 2014. Oyarzo, represented by counsel, and
3 a vocational expert testified (Tr. 27-57). The ALJ issued an unfavorable decision
4 date May 16, 2012 (Tr. 11-21). The Appeals Council denied review September 4,
5 2014 (Tr. 1-6). The matter is now before the Court pursuant to 42 U.S.C. § 405(g).
6 Plaintiff filed this action for judicial review on October 14, 2014. ECF No. 1,4.

7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative hearing transcript, the
9 ALJ's decision and the parties' briefs. They are briefly summarized here and as
necessary to explain the court's decision.

10 Oyarzo was 52 years old when he applied for benefits. He has a tenth grade
11 education and has not earned a GED. He has worked as an electrician, construction
12 worker and building maintenance worker. He testified he cannot work due to pain
13 in his back, shoulders, hands and right knee. He can walk or stand two hours out of
14 eight and lift five to eight pounds. He drinks with friends even though he lives in a
15 clean and sober house. He takes prescribed pain medication and watches television.
16 In January 2013 he said he had been incarcerated for two months after "being
17 involved in a riot at the fairgrounds" (Tr. 33-38, 42-44, 46-49, 339).

18 **SEQUENTIAL EVALUATION PROCESS**

19 The Social Security Act (the Act) defines disability as the "inability to

1 engage in any substantial gainful activity by reason of any medically determinable
2 physical or mental impairment which can be expected to result in death or which
3 has lasted or can be expected to last for a continuous period of not less than twelve
4 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
5 plaintiff shall be determined to be under a disability only if any impairments are of
6 such severity that a plaintiff is not only unable to do previous work but cannot,
7 considering plaintiff’s age, education and work experiences, engage in any other
8 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423
9 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both
10 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
11 (9th Cir. 2001).

12 The Commissioner has established a five-step sequential evaluation process
13 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
14 one determines if the person is engaged in substantial gainful activities. If so,
15 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
16 decision maker proceeds to step two, which determines whether plaintiff has a
17 medically severe impairment or combination of impairments. 20 C.F.R. §§
18 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment
or combination of impairments, the disability claim is denied.

19 If the impairment is severe, the evaluation proceeds to the third step, which

1 compares plaintiff's impairment with a number of listed impairments
2 acknowledged by the Commissioner to be so severe as to preclude substantial
3 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
4 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed
5 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
6 not one conclusively presumed to be disabling, the evaluation proceeds to the
7 fourth step, which determines whether the impairment prevents plaintiff from
8 performing work which was performed in the past. If a plaintiff is able to perform
9 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
10 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
11 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
12 final step in the process determines whether plaintiff is able to perform other work
13 in the national economy in view of plaintiff's residual functional capacity, age,
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
15 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

16 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
17 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
18 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
met once plaintiff establishes that a physical or mental impairment prevents the
performance of previous work. The burden then shifts, at step five, to the

1 Commissioner to show that (1) plaintiff can perform other substantial gainful
2 activity and (2) a “significant number of jobs exist in the national economy” which
3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

4 **STANDARD OF REVIEW**

5 Congress has provided a limited scope of judicial review of a
6 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the
7 Commissioner’s decision, made through an ALJ, when the determination is not
8 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
9 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
10 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be
11 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
12 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial
13 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
14 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
15 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence
16 as a reasonable mind might accept as adequate to support a conclusion.”
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch
18 inferences and conclusions as the [Commissioner] may reasonably draw from the
19 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir.
1965). On review, the Court considers the record as a whole, not just the evidence

1 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
2 22 (9th Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to resolve conflicts in
4 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
5 interpretation, the Court may not substitute its judgment for that of the
6 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
7 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
8 set aside if the proper legal standards were not applied in weighing the evidence
9 and making the decision. *Brawner v. Secretary of Health and Human Services*, 839
10 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
11 administrative findings, or if there is conflicting evidence that will support a
12 finding of either disability or nondisability, the finding of the Commissioner is
13 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

13 **ALJ'S FINDINGS**

14 At step one ALJ Boyce found Oyarzo did not work at SGA levels after onset
15 (Tr. 13). At steps two and three, she found he suffers from right shoulder
16 degenerative joint disease (DJD), degenerative disc disease, right knee
17 osteoarthritis and scoliosis, impairments that are severe but do not meet or
18 medically equal a listed impairment (Tr. 13-15). The ALJ found Oyarzo less than
19 fully credible (Tr. 16). She assessed an RFC for a range of light work Tr. 15). ALJ

1 Boyce relied on a vocational expert when she found at step four Oyarzo is unable
2 to perform past relevant work (Tr. 19, 51). At step five, again relying on a
3 vocational expert's testimony, the ALJ found Oyarzo can perform other jobs such
4 as production assembler, hand packager and housekeeper (Tr. 20-21, 51-52). The
5 ALJ concluded Oyarzo was not disabled from onset through date of the decision
6 (Tr. 21).

7 ISSUES

8 Oyarzo alleges the ALJ erred when she weighed the medical evidence and
9 at step five. ECF No. 13 at 4, 7-13. The Commissioner asks the court to affirm,
10 alleging the ALJ applied the correct legal standards, the decision is supported by
11 substantial evidence and any error is harmless requiring at most remand for further
12 proceedings. ECF No. 14 at 1-2.

13 DISCUSSION

14 A. *Nurse practitioner's opinion*

15 Oyarzo alleges the ALJ erred when she failed to properly credit the opinion
16 of treatment provider Jody Gray, a nurse practitioner. ECF No. 13 at 7-10. The
17 Commissioner responds that the ALJ gave germane reasons for rejecting this
18 opinion, as is appropriate when an ALJ weighs the opinion of a non-acceptable
19 medical source. ECF No. 14 at 4-8.

To aid in weighing the conflicting medical evidence, the ALJ evaluated

1 Oyarzo's credibility. Credibility determinations bear on evaluations of medical
2 evidence when an ALJ is presented with conflicting medical opinions or
3 inconsistency between a claimant's subjective complaints and diagnosed condition.
4 See *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). It is the province of the
5 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039
6 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent
7 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
8 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's
9 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
Cir. 1995).

10 The ALJ's reasons for the credibility determination are clear and convincing.

11 The ALJ notes Oyarzo's allegations exceed objective findings during
12 examinations (Tr. 16-17, referring to Tr. 246-50; *see also* Tr. 239, 244, 299-300,
13 344-45, 336). Oyarzo inconsistently reports alcohol use, as the ALJ points out. Tr.
14 18, referring to Tr. 317 (admits drinks socially on May 3, 2011); Tr. 241 (reports
15 on May 11, 2011 no history of alcohol use); Tr. 339 (in January 2013 says is
16 drinking alcohol but not "all of the time") and Tr. 216 and 353 (notes in June 2012
17 show no history of alcohol use). *See also* Tr. 299 (August 2012 tells provider he
18 "had some beers yesterday"). Oyarzo has a poor work history, including no income
19 from 1979 through 1993, indicating low motivation (Tr. 18). His activities,

1 including riding a bicycle for transportation, are inconsistent with allegedly
2 disabling limitations (Tr. 18, referring to Tr. 39, 48-49, 299). Treatment has been
3 infrequent and conservative (Tr. 18). Most telling, Oyarzo “appeared to falsify
4 crepitation sounds during abduction testing” by making a sound with his jaw while
5 his shoulder was being tested (Tr. 14, referring to Tr. 249).

6 The ALJ’s reasons are clear, convincing and supported by the record. *Burch*
7 *v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005)(lack of medical evidence is properly
8 considered as long as it is not the sole basis for discounting pain testimony, daily
9 activities are properly considered); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th
10 Cir. 2002)(proper factors include inconsistencies in claimant’s statements and
11 inconsistencies between statements and conduct); *Fair v. Bowen*, 885 F.2d 597,
12 603 (9th Cir. 1989)(unexplained noncompliance with medical treatment is properly
13 considered). Evidence of conservative treatment is sufficient to discount a
14 claimant’s testimony regarding the severity of an impairment. *Parra v. Astrue*, 481
15 F.3d 742, 750-51 (9th Cir. 2007). A tendency to exaggerate complaints of pain may
16 be considered when weighing credibility. See *Edlund v. Massanari*, 253 F.3d 1152,
17 1157 (9th Cir. 2001).

18 In July 2013 treating nurse practitioner Jody Gray opined Oyarzo was unable
19 to work (Tr. 357). The ALJ rejected this opinion because it is inconsistent with
medical findings and with Oyarzo’s demonstrated abilities (Tr. 19). It is also

1 unsupported by accompanying findings.

2 The ALJ is correct. The ALJ may properly reject a physician's contradicted
3 opinion that is inconsistent with the record as a whole. *Orn v. Astrue*, 495 F.3d
4 625, 631 (9th Cir. 2007)(citation omitted). The ALJ may reject any opinion that is
5 brief, conclusory and inadequately supported by clinical findings. *Bayliss v.*
6 *Barnhart*, 427 F.3d 1211, 1216 99th Cir. 2005). A check-box form, such as the one
7 signed by Ms. Gray, is entitled to little weight. *Crane v. Shalala*, 76 F.3d 251, 253
8 (9th Cir. 1996)(ALJ's rejection of a check-off report that did not contain an
9 explanation of the bases for the conclusions was permissible). Here, the record
10 does not show that Nurse Gray relied on objective findings when she rendered her
11 opinion, contrary to Plaintiff's assertion at ECF No. 15, page 4.

12 In addition, the Commissioner is correct that Ms. Gray is not an acceptable
13 medical source as defined by 20 C.F.R. § 416.913(a). Here, even if she was an
14 acceptable medical source, the ALJ's reasons for rejecting her opinion are specific,
15 legitimate and supported by substantial evidence.

16 ***B. Step five***

17 Oyarzo alleges the ALJ erred at step five because she failed to include
18 standing and walking limitations in her hypothetical to the vocational expert. ECF
19 No. 13 at 10-13. The Commissioner answers that the ALJ's hypothetical included
all of the limitations established by the evidence, and the ALJ properly relied on

1 the VE's opinion. ECF No. 14 at 8-13.

2 Treating physician Anna Espiritu, M.D., opined on June 6, 2012 Oyarzo
3 could perform a range of sedentary to light work. She opined he could sit most of
4 the day and walk or stand for brief periods. She assessed postural and fine motor
5 skill restrictions. She opined Oyarzo may improve "if problems can be fixed
6 through ortho" (Tr. 203, 354).

7 The ALJ found Oyarzo can perform a range of light work. To the extent she
8 rejected Dr. Espiritu's opinion that plaintiff is more limited, the ALJ is correct.
9 More dire limitations are contradicted by the medical evidence, by Oyarzo's
10 activities, and by his diminished credibility. Multiple exams showed that objective
11 findings were largely benign, with no range of motion limitations, no motor
12 strength deficits, no gait impairment and normal straight leg raises when tested. In
13 June 2010, a month after onset, a treatment provider at Yakima Health (signature
14 illegible) opined Oyarzo could sit, stand and walk for six hours out of eight, lift 50
15 pounds occasionally and 25 frequently and limitations were expected to last six
months (Tr. 207).

16 Opinions premised on Plaintiff's subjective complaints and testing within
17 Plaintiff's control are properly given the same weight as Plaintiff's own credibility.
18 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The ALJ's residual
19 functional capacity assessment is fully supported by the record.

C. Remand

Last, Defendant asks that if the matter is remanded, it is remanded for further administrative proceedings rather than an award of benefits. ECF No. 14 at 13-15. In the Court's view any error by the ALJ is clearly harmless as the overall conclusion is fully supported by the record as a whole.

There was no harmful error. It is the ALJ's province to resolve ambiguity in the record. Although Oyarzo alleges the ALJ should have weighed the evidence differently, the ALJ is responsible for reviewing the evidence and resolving conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

The ALJ's reasons for rejecting more dire limitations are specific, legitimate and supported by substantial evidence. The ALJ assessed an RFC that is consistent with the record as a whole. There was no harmful error.

CONCLUSION

After review the Court finds the ALJ's decision is supported by substantial evidence and free of harmful legal error.

IT IS ORDERED:

1. Defendant's motion for summary judgment, **ECF No. 14**, is granted.
2. Plaintiff's motion for summary judgment, ECF No. 13, is denied.

The District Executive is directed to file this Order, provide copies to

1 counsel, enter judgment in favor of defendant, and **CLOSE** the file.

2 DATED this 21st day of May, 2015.

3
4 s/James P. Hutton

5 JAMES P. HUTTON

6 UNITED STATES MAGISTRATE JUDGE

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